

SUPERIOR COURT OF ARIZONA  
MARICOPA COUNTY

CV 2013-054702

01/28/2014

HONORABLE MICHAEL D. GORDON

CLERK OF THE COURT  
M. MINKOW  
Deputy

SCOTT SAVILLE, et al.

SCOTT SAVILLE  
P O BOX 4103  
CAVE CREEK AZ 85327

v.

FARMERS INSURANCE COMPANY OF  
ARIZONA

JASON P KASTING

ELONICA SAVILLE  
P O BOX 4103  
CAVE CREEK AZ 85327

RULING MINUTE ENTRY

**I. INTRODUCTION**

In this lawsuit, Plaintiffs Scott and Elonica Saville (“Savilles”) have sued Defendant Farmers Insurance Company of Arizona (“Farmers”) for breach of the covenant of good faith and fair dealing, more commonly referred to as “bad faith.” *See* Complaint (filed 10/1/13).

Generally, the Savilles allege:

- The Savilles purchased an insurance policy for their rental property located at 5936 W. Bellview, Phoenix, AZ 85043 (“Property”). *See, e.g.*, Complaint at ¶¶1-26, 41-45, 51-52, 70.
- During 2011, the Savilles leased the property to Tenants who vandalized the Property on or about July 10, 2011. *E.g., id.* at ¶¶27-35, 56-61.

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- The damage for vandalism included claims arising from iron bars (which covered the windows) being ripped out. E.g., *id.* at ¶¶44 & 52-53.
- The Savilles filed a claim on or about July 14, 2011 with Farmers (“Vandalism Claim”). E.g., *id.* at ¶33
- At that time, the Savilles had a second claim pending with Farmers for hail damage. (“Hail Claim”). *Id.* at ¶¶ 40, 43, 52-53.
- Farmers acted in bad faith when it denied the Savilles’ Vandalism Claim based on the Savilles’ putative failure to cooperate by providing requested financial information and their alleged misrepresentations made in the claim for damage to the window exteriors. *Id.* at ¶¶ 47, 62-66.
- Farmers acted in bad faith when it took the Savilles’ sworn statement, called an Examination under Oath (“EUO”), and when it deliberately refused the Savilles access to all available photographs in order to trip them up as part of a preconceived plan to deny the claim based on fraud. E.g., *id.* at ¶¶ 42-45 & 52-53.

## II. PENDING MOTIONS

Farmers filed a Motion for Summary Judgment on December 4, 2013. The Savilles filed their response, and a Reply was timely filed as well. No oral argument request has been made, and the matter is ready for ruling.

Also pending is “Plaintiff’s Motion for Accelerated Review and Motion to Amend Complaint due to “typo” and Motion to Amend Response to Defendants’ Motion for Summary Judgment and Motion to Supplement Response to DSMJ and Supplemental Response.” (“Motion to Supplement,” “Motion to Amend Complaint” and “Motion for Accelerated Review”). The document was filed January 28, 2014. Clearly, Farmers has not had an opportunity to respond to these motions.

The Court addresses the motions below.

### A. Farmers’ Motion for Summary Judgment

The Court has reviewed Farmers’ Motion for Summary Judgment, the Response and the Reply in light of the standards set forth in *Orme Schools v. Reeves*, 802 P.2d 1000 (Ariz. Sup. Ct. 1990) (summary judgment standards) and *National Bank of Arizona v. Thruston*, 180 P.3d 977 (Ariz. Ct. App. 2008) (requiring movant to meet its burden of production with respect to

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affirmative defenses). The Court will deny the Motion for Summary Judgment. As Rule 56(a) directs, the Court sets forth its reasons for denying the Motion for Summary Judgment *herein*.

First, Farmers asks the Court to enter summary judgment based upon a contract provision that requires the insured to cooperate:

SECTION 1- CONDITIONS

...

2. *Your Duties After Loss*

If a loss occurs, you will perform the following duties:

...

d. as often as we reasonable require:

...

(2) provide us with records and documents we may request, including banking or other financial records, if obtainable and permit us to make copies.

(3) submit to examination under oath [EUO] and sign a transcript of the same.

See Farmers' Statement of Facts, at Exhibit 1, p.9.

Farmers claims that the Savilles breached the cooperation clause, as a matter of law, and therefore that Farmers was entitled to deny coverage---- defeating the bad-faith claim. The Court disagrees with Farmers that this matter may be decided by summary judgment. While there is little dispute that Savilles did not provide all the information requested, there remains a material question of fact as to whether the insured suffered substantial prejudice. *See e.g., Clark Equipment v. Arizona Property and Cas. Ins. Guar. Fund*, 943 P.2d 793 (Ariz. Ct. App. 1997) (permitting an insurer to deny coverage based upon a failure to cooperate but only upon showing "substantial prejudice"). There is a dearth of evidence on this issue.

Farmers also claims that the Savilles made a material misrepresentation when making their claim for damage to the rental property and, therefore, summary judgment is appropriate. Farmers argues that the policy's "fraud" provision requires that result.<sup>1</sup> Specifically, Farmers relies on the a "General Condition," which states in relevant part:

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<sup>1</sup> Quizzically, Farmers generally claims it was entitled to rescission when there is any misrepresentation. Farmers, however, cites to cases where the fraud occurred in the insurance application. *See, e.g., Medical Protective Co. v. Pang*, 606 F. Supp.2d 1049 (D. Ariz. 1989). Still, as noted *herein*, Farmers correctly relies on an enforceable policy provision that voids the policy where the fraud is made in connection with the claim which would give it the same relief.

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**GENERAL CONDITIONS**

**Applying to the Entire Policy**

...

3. *Concealment or Fraud. The entire policy is void if any insured has knowingly and willfully concealed or misrepresented any material fact or circumstance relating to the insurance before or after the loss.*

The core of Farmer's Motion on this point is that the Savilles misrepresented their Vandalism Claim for damage to the house. Specifically, Farmers alleges that the Savilles lied about the condition of the house, mostly with respect to the safety bars around the windows--- and the alleged stucco damage to the home when the bars were purportedly torn from the house. Clearly, if a material misrepresentation was demonstrated as a matter of law, the policy is void and the Savilles' claim would be defeated. *See, e.g., Mutual of Enumclaw Insur. Co. v. Cox*, 757 P.3d 499 (Wa. S.Ct. 1988) (applying this fraud provision to deny liability).

The Court, however, finds that whether there is a material misrepresentation is a material question of fact. The Savilles credibly allege that they were confused when shown photographs out of context, especially with a separate Hail Claim pending on the same home. Indeed, the Savilles affirmatively allege that denial of the access to all Hail Claim photos during the EUO constituted an effort to confuse and deceive the Savilles as a means to deny coverage. Material facts permeate this issue and cannot be decided in summary judgment proceedings.

Accordingly, the Motion for Summary Judgment will be denied.

**B. The Savilles' Motion to Supplement**

Having decided that Farmers' Motion for Summary judgment must be denied, the Court will deny the Savilles' Motion to Supplement as Moot. The Court will also deny the Motion for Accelerated Review as Moot.

**C. Motion to Amend**

The Court will await full briefing before ruling on the Motion to Amend.

**III. RULINGS**

IT IS ORDERED:

- DENYING Farmers' Motion for Summary Judgment filed December 4, 2013.

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- DENYING the Savilles' Motion to Supplement and Motion for Accelerated Review filed January 28, 2014 as MOOT.

ALERT: The Arizona Supreme Court Administrative Order 2011-140 directs the Clerk's Office not to accept paper filings from attorneys in civil cases. Civil cases must still be initiated on paper; however, subsequent documents must be eFiled through AZTurboCourt unless an exception defined in the Administrative Order applies.